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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSHUA ANDREW CORDOVA, Defendant and Appellant.	E069548 (Super.Ct.No. FWV17000359) OPINION

APPEAL from the Superior Court of San Bernardino County. Rafael A. Arreola, Judge. Affirmed with directions.

Thien Huong Tran, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland, Scott C. Taylor, Arlene A. Sevidal and James M. Toohey, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

Defendant and appellant, Joshua Andrew Cordova, hit J.C., his elderly grandfather, with a flashlight causing grandfather to incur minor injuries. The jury found defendant guilty of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1))[1] and elder abuse (§ 368, subd. (b)(1)). Defendant admitted a prior serious felony conviction under section 667, subdivision (a)(1), and a prior strike under section 667, subdivisions (b) through (i). Thereafter, the trial court sentenced defendant to nine years in prison.

On appeal defendant argues there is insufficient evidence to support the jury verdicts for the aggravated assault and elder abuse convictions. We find substantial evidence supports the verdicts. He also alleges ineffective assistance of counsel (IAC) because defense counsel failed to object to the prosecutor's closing argument that the jury had to acquit defendant on the greater charged offenses before deliberating on the lesser offenses. We conclude that defense counsel's performance was not defective. Defendant filed a supplemental brief arguing recently enacted Senate Bill No. 1393 (2017-2018 Reg. Sess.) requires that his case be remanded for resentencing so the trial court can exercise discretion whether to dismiss or strike his five-year prior serious felony enhancement. The People concede that a remand for resentencing is appropriate. We remand the case for the limited purpose of allowing the trial court to consider whether to dismiss or strike

[1] All further statutory references are to the Penal Code.

the section 667, subdivision (a) enhancement and, if so, to resentence defendant accordingly. In all other respects, we affirm the judgment.

II.

FACTS AND PROCEDURAL HISTORY

A. *Prosecution's Case*

Defendant's grandfather, age 77, lives in Fontana. In 2016, defendant lived at his grandparents' residence. However, defendant was kicked out of his grandparents' home due to his chronic methamphetamine use. When defendant used methamphetamine, he would get paranoid and say someone was inside the home. After he was kicked out of his grandparents' home, defendant had a parole condition requiring him to stay away from the residence.

On January 21, 2017, defendant went to his grandparents' home around 6:00 a.m., while it was still dark. Grandfather was sleeping in his bed at home beside his wife and awoke when he heard his locked bedroom door being broken into and saw a person move towards his side of the bed. Frantic, grandfather jumped up out of bed and charged the intruder, only to discover the intruder was defendant.

During their struggle, defendant hit grandfather's upper arm with a dense plastic flashlight. Defendant then ran outside and around to the rear of the yard to where an outside sliding glass door was connected to his grandparents' bedroom. Grandfather saw defendant in the backyard, picked up a piece of PVC pipe, and chased defendant away. When defendant jumped the fence, grandfather went back inside his home and called the

Fontana Police Department.

Officer Abraham Valles arrived to investigate the emergency call. When he arrived, Officer Valles saw defendant standing in front of his grandparents' home holding a flashlight. Officer Valles examined the flashlight and did not find any blood on it. He took a photograph of the flashlight. Officer Valles also noticed that grandfather had a bloody abrasion on his wrist and a slight redness on his arm. At the time, grandfather was unaware that the abrasion on his wrist was bleeding. Officer Valles interviewed grandfather about the altercation that was recorded and played for the jury at trial. In the interview, grandfather told Officer Valles that defendant had only hit him in the arm once with the flashlight during their struggle.

At trial, grandfather's testimony was inconsistent with the statements he made during the interview with Officer Valles. Grandfather testified he did not feel the flashlight hit him and he felt no pain when defendant hit him with the flashlight. However, grandfather testified that he was hit twice during the altercation, on his forearm, and on his wrist that caused the bloody abrasion. Grandfather also testified that he repaired cars and had existing bruises and scabs on his arms that would bleed every day, but he was certain that the bloody abrasion on his wrist happened during the scuffle when defendant hit him with the flashlight.

B. *Defense Case*

Defendant's mother lived in the garage that was connected to his grandparents' home. Defendant was homeless. Early in the morning, defendant's mother found him a few blocks away, and because it was raining, she suggested that he come back with her to his grandparents' home to change out of his wet clothes and shower while grandfather slept. Defendant's mother gave him the flashlight. Defendant entered the residence through the garage door. As defendant was in the hallway area near the bathroom and close by his grandparents' bedroom door, he heard a noise coming from inside his grandparents' bedroom that sounded like his grandmother was choking. Because defendant thought someone was inside the bedroom choking his grandmother, he forced the door open to his grandparents' bedroom. When defendant entered the room, grandfather charged at him and said, "'[G]et out of here, you son of a bitch.'"

Defendant ran from the bedroom and out of the front door while his grandfather yelled, "'I'm calling the cops.'" While defendant was outside, he still thought an intruder was inside the home. Defendant ran around to the back of the home with his flashlight to see if someone was still inside his grandparents' bedroom. After grandfather saw him, grandfather yelled, "'Get the hell out of here.'"

Defendant left and went to a neighbor's residence because he was worried that someone was trying to steal things at his grandparents' home. He asked the neighbor to check on grandfather. When police arrived, defendant was standing in front of his grandparents' home holding the flashlight and waiting for the neighbor to check on

grandfather.

At trial, defendant denied hitting grandfather with the flashlight or that a struggle had ensued. Defendant admitted to chronic methamphetamine use. He claimed that he had not used methamphetamine the morning of the altercation. Defendant also admitted that he would sometimes hallucinate when he used methamphetamine, but he did not think he had hallucinated that there was an intruder inside his grandparents' home.

C. *Rebuttal*

The prosecution presented circumstantial evidence that defendant was under the influence of methamphetamine when he broke into grandfather's locked bedroom. That morning, defendant appeared to be on drugs. On numerous occasions, grandfather had observed defendant under the influence of drugs that made defendant paranoid. When question about the incident by Officer Valles, defendant said that there was an intruder inside grandparents' home, but he could not provide a description of the suspected intruder.

D. *Procedural History*

Defendant was charged with assault with a deadly weapon (§ 245, subd. (a)(1)); count 1) and elder abuse (§ 368, subd. (b)(1)); count 2). A prior serious felony conviction (§ 667, subd. (a)(1)) was further alleged in count 1, and a prior strike (§ 667, subds. (b)-(i)) was alleged as to both counts. Defendant pleaded not guilty to all charges and denied the allegations. Following a bifurcated jury trial, defendant was found guilty on both counts. Defendant waived his right to trial on the

prior allegations and admitted them as alleged. The trial court sentenced defendant to two years for assault with a deadly weapon, count 1, which was doubled to four years for the prior strike, and five years consecutive for the prior serious felony, for a total of nine years in prison. The trial court stayed the sentence for felony elder abuse, count 2. Defendant filed a timely notice of appeal.

III.

DISCUSSION

A. *Substantial Evidence Supports the Jury's Verdicts for Counts 1 and 2*

Defendant argues his convictions for assault with a deadly weapon (§ 245, subd. (a)(1)); count 1), and elder abuse (§ 368, subd. (b)(1)); count 2) should be reversed because there was insufficient evidence for the jury to convict him on both counts. The People argue there was sufficient evidence of both offenses presented at trial because defendant struck grandfather with the dense plastic flashlight during the struggle.

We evaluate a sufficiency of the evidence challenge by reviewing the evidence presented at trial in the light most favorable to the prosecution's case to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; see also *People v. Johnson* (1980) 26 Cal.3d 557, 578.) Applying this legal standard, we review whether the record "discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson*, *supra*, at p. 578; *People v.*

Harris (2013) 57 Cal.4th 804, 849.)

On review we do not resolve credibility issues nor evidentiary conflicts. Rather, we must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v Harris*, *supra*, 57 Cal.4th at 849.) If the circumstances reasonably justify the trier of fact's findings, our opinion that the circumstances might also reasonably be reconciled with a contrary finding does not warrant reversal of the judgment. (*Id.* at p. 850.) A defendant's conviction will only be reversed when it appears that upon no hypothesis whatever is there sufficient substantial evidence to support the jury's verdict. (*People v. Manibusan* (2013) 58 Cal.4th 40, 87.)

B. *Assault with a Deadly Weapon or Instrument (§ 245, subd. (a)(1))*

Defendant argues there was insufficient evidence that the flashlight was used as a deadly weapon because the flashlight was a "typical" handheld flashlight that weighed three to five pounds, and grandfather received only minor injuries (a slight redness to grandfather's arm and possibly a hit on the left wrist). Defendant contends his aggravated assault conviction should be reduced to simple assault.

The People assert the flashlight is made of dense plastic and has a handle and trigger mechanism that more closely resembles a radar gun and is capable of producing great bodily injury. The People contend the jury was entitled to consider the nature of the object, the manner in which it was used, and all other relevant facts including grandfather's advanced age and physical condition, to determine whether defendant was guilty of aggravated assault.

As we explain below, we conclude there was substantial evidence that the flashlight was used in a manner likely to produce death or great bodily injury.

Section 245, subdivision (a)(1) punishes assaults committed "with a deadly weapon or instrument other than a firearm." As used in the statute, the term "'"deadly weapon" is "any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury."' [Citation.]" (*In re B.M.* (2018) 6 Cal.5th 528, 532-533 (*B.M.*).) Section 245 contemplates two categories of deadly weapons. Objects such as dirks and blackjacks are deadly weapons as a matter of law because the ordinary use for which they are designed establishes their character as such. (*B.M.*, *supra*, at p. 533.) Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury. (*Ibid*.)

An instrument can be a deadly weapon even if it is not used with deadly force. (*People v. Page* (2004) 123 Cal.App.4th 1466, 1472.) "For example, a bottle or a pencil, while not deadly per se, may be a deadly weapon within the meaning of section 245, subdivision (a)(1), when used in a manner capable of producing and likely to produce great bodily injury. [Citations.]" (*People v. Brown* (2012) 210 Cal.App.4th 1, 7.) Additionally, objects that can be grasped while throwing a punch, like rolls of coins, batteries, or bicycle footrests, may be found to be instruments of aggravated assault. (*In re David V.* (2010) 48 Cal.4th 23, 30, fn. 5.) Whether heavy objects can become deadly or dangerous weapons, according to the manner of use, is a question of fact for the jury,

and turns on the facts in each case. (*People v. Davis* (1996) 42 Cal.App.4th 806, 819, citing *People v. Raleigh* (1932) 128 Cal.App.105, 108-109; *People v. Klimek* (1959) 172 Cal.App.2d 36, 41-42.)

Recently, in *B.M.*, our Supreme Court discussed the relevant criteria that must be evaluated to determine whether an object is used in a manner likely to produce death or great bodily injury within the meaning of the aggravated assault statute. (§ 245, subd. (a)(1).) First, the object charged as a dangerous weapon must be used in a manner that is not only """capable of producing [but also] likely to produce, death or great bodily injury."""" (*B.M., supra*, 6 Cal.5th at p. 533.) This requires more than a mere possibility that serious injury could have resulted from the object used. (*Ibid*.)

Second, conjecture as to how the object could have been used is not permitted. Rather, the determination must rest on evidence of how the defendant actually used the object. (*B.M., supra*, 6 Cal.5th at p. 534.) This requirement turns on "'the force *actually used*,' not 'the force that . . . *could* have [been] used.'" (*Ibid*.) Additionally, the *B.M.* court reasoned that although it is inappropriate to consider how the object could have been used as opposed to how it was actually used, it is appropriate to consider what harm could have resulted from the manner in which the object was actually used. (*Id*. at p. 535.) Thus, "[a]nalysis of whether the defendant's manner of using the object was likely to produce death or great bodily injury necessarily calls for an assessment of potential harm in light of the evidence." (*Ibid*.) This means "the evidence may show that serious injury was likely, even if it did not come to pass." (*Ibid.*)

In assessing "'the force'" actually used, we recognize this is a factual question for the jury to determine using its own "common sense." (*People v. Mungia* (1991) 234 Cal.App.3d 1703, 1709.) "[T]he defendant's physical characteristics in comparison to those of the victim may also be particularly relevant in determining whether the physical act applied by the defendant to the victim constituted 'force.' A shove by a defendant who is larger or stronger than his victim may lead a jury to find that the shove amounted to the necessary 'force.'" (*Ibid*.) In considering what harm could have resulted, the jury is permitted to consider the way the flashlight was actually used. (*B.M.*, *supra*, 6 Cal.5th at p. 535.)

Third, "limited injury or lack of injury may suggest that the nature of the object or the way it was used was not capable of producing or likely to produce death or serious harm." (*B.M.*, *supra*, 6 Cal.5th at p. 535.) Nevertheless, an aggravated assault conviction does not require proof of any injury or even physical contact. (*Ibid*.)

In *B.M.*, *supra*, 6 Cal.5th 528, the defendant used a "butter knife" with a dull tip and serrated edge to scare her sister, Sophia. When Sophia saw B.M. come at her with the butter knife, she covered herself with a blanket that was on a bed. B.M. then made some stabbing motions with the knife in the area around Sophia's legs from a distance of about three feet. The knife hit Sophia's blanketed legs "a few" times. The pressure applied was like a five or six, on a scale of one to 10, with 10 being the most pressure. (*Id.* at pp. 531-532.)

Based on this evidence, the Court of Appeal found B.M. could have easily committed mayhem upon Sophia's face. However, the Supreme Court rejected the appellate court's conclusion because there was no evidence that B.M. had stabbed, sliced or pointed the butter knife toward or near Sophia's face or that B.M. had threatened to do so. Nor was there any evidence that B.M. was flailing her hand uncontrollably. (*B.M.*, *supra*, 6 Cal.5th at p. 535.) The *B.M.* court found the moderate pressure B.M. applied with the knife to Sophia's legs was insufficient to pierce the blanket, much less cause serious bodily injury to Sophia. (*Id.* at p. 536.) Based on these facts, the *B.M.* court reversed, concluding there was no substantial evidence that B.M.'s stabbing motions to Sophia's blanketed legs was capable of causing great bodily injury. (*Id.* at p. 539.)

With these principles in mind, we must apply the same criteria to determine whether the flashlight used by defendant to hit grandfather was capable of producing and likely to produce, death or great bodily injury. (*People v. Superior Court* (*Tejeda*) 1 Cal.App.5th 892, 901 [the holding of our state's highest court must be followed by all inferior California courts].)

Here, applying the reasoning in *B.M.*, the record reflects that the jury heard evidence from grandfather, the neighbor and Officer Valle. In addition, defendant did not look normal, appeared jittery, paranoid and on methamphetamine, and said an intruder was inside his grandparents' bedroom, indicating that, even under his version of events, he intended to enter the room to assault someone with the flashlight. Defendant broke into grandfather's room and after being confronted by grandfather, struck the elderly man

more than once with a flashlight that weighed between three and five pounds. While grandfather was struck on his arms, it was dark and there is no evidence to suggest defendant aimed only for the arms.

The jury was shown a photograph of the dense plastic flashlight with a large handle grip. The flashlight weighed three to five pounds, was five to six inches in width, six to seven inches in length, and had a lens diameter of three to four inches. Considering the manner in which defendant burst into his grandparents' locked bedroom, it was reasonable for the jury to deduce from the evidence that defendant intended to use combative *force* with the hand gripped flashlight to defend himself against the perceived intruder, that turned out to be grandfather.

Although relevant to the evaluation of force, whether grandfather admitted that he was not hit hard by the flashlight and had minimal injuries that did not require medical attention, are not dispositive factors. Defendant was much larger than grandfather. The altercation between grandfather and defendant occurred in the dark. The jury was entitled to consider grandfather's physical condition in determining whether the flashlight was likely to cause serious bodily injury. Grandfather was 77 years old and had existing bruises and scabs that would bleed every day. With injury, age carries with it an increased risk of bone fractures from being hit or from a fall. (See *People v. Racy* (2007) 148 Cal.App.4th 1327, 1333 (*Racy*).)

We conclude there is substantial evidence that defendant used the flashlight in a manner likely to cause serious bodily injury. We therefore reject defendant's contention that his conviction should be reduced to simple assault.

C. *Elder Abuse (§ 368, subd. (b)(1))*

Defendant's conviction for felony elder abuse is based on the same facts underlying his aggravated assault conviction. He argues his conviction for felony elder abuse should be reduced to a misdemeanor because grandfather was hit with an ordinary flashlight during their "tussle" and the flashlight was not used in a manner likely to cause great bodily harm or death to grandfather. The People contend that a conviction for felony elder abuse does not require the victim suffer great bodily harm or injury. Rather, the key inquiry is whether the circumstances were "'*likely* to produce great bodily harm or death.'" Reviewing the record in the light most favorable to the prosecution's case, we conclude there is substantial evidence to support the jury's verdict of felony elder abuse because the altercation could have resulted in a deadly or serious injury to defendant's 77-year-old grandfather.

Section 368, subdivision (b)(1) provides punishment for any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any dependent adult, with knowledge that he or she is a dependent adult, to suffer, or inflicts thereon unjustifiable physical pain or mental suffering. (*Roman v. Superior Court* (2003) 113 Cal.App.4th 27, 31.) The statute applies to a wide range of abusive situations, including assaultive conduct, and was enacted in order to protect

members of a vulnerable class from abusive situations in which serious injury or death is likely to occur. (*People v. Heitzman* (1994) 9 Cal.4th 189, 197, 203.)

"[T]he difference between felony elder abuse and misdemeanor elder abuse is whether the abuse is perpetrated 'under circumstances or conditions *likely* to produce great bodily harm or death.' If it is, the crime is a potential felony. (§ 368, subd. (b)(1).) If it is not, the crime is a misdemeanor. (§ 368, subd. (c).)" (*Racy, supra,* 148 Cal.App.4th 1327, 1334-1335, italics added.) The term "likely" has been defined as a substantial danger, i.e., a serious and well-founded risk, of great bodily harm or death. (Cf. *People v. Wilson* (2006) 138 Cal.App.4th 1197, 1204.) "'Great bodily harm refers to significant or substantial injury and does not refer to trivial or insignificant injury.'" (*People v. Cortes* (1999) 71 Cal.App.4th 62, 80.) There is no requirement the victim must actually suffer great bodily injury, only that the circumstances are *likely* to produce such injury. (*Roman v. Superior Court, supra,* 113 Cal.App.4th at p. 35.)

In *Racy, supra,* 148 Cal.App.4th 1327, the defendant zapped the victim in the leg with a stun gun, and then followed him into a bedroom, grabbed the victim's wallet, and tore the victim's jean pocket. The struggle moved the victim's bed approximately one foot away from the wall, causing the victim to trip. (*Id*. at pp. 1332-1333.) The *Racy* court concluded there was substantial evidence that the jury could have reasonably concluded the circumstances were likely to produce great bodily harm or death because there was an increased risk the 74-year-old victim would have bone fractures from a fall. (*Ibid*.)

Whether the evidence establishes abusive circumstances or conditions likely to produce great bodily harm or death is a question of fact for the jury. (*People v. Thiel* (2016) 5 Cal.App.5th 1201, 1213; see also *People v. Cross* (2008) 45 Cal.4th 58, 64.) We therefore examine the entire record to determine whether a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt of felony elder abuse. (*People v. Thiel*, *supra*, at p. 1217.)

Here, there was substantial evidence that the circumstances that resulted in the altercation were "likely to produce great bodily harm or death." (§ 368, subd.(b)(1).) Grandfather was sleeping in his bed when he was suddenly aroused by an intruder who broke into the locked bedroom door and entered the room. Defendant was jittery and appeared to be under the influence of drugs when he hit grandfather during the altercation in the dark. Grandfather was frail and had existing bruises and scabs that would bleed every day. The altercation's circumstances were likely to produce great bodily harm or death because it could have resulted in a deadly or serious fall to grandfather. (See *Racy*, *supra*, 148 Cal.App.4th 1327, 1333.) We therefore find substantial evidence supports the jury's verdict of felony elder abuse and reject defendant's contention that his conviction should be reduced to a misdemeanor.

D. *Ineffective Assistance of Counsel*

Relying on *People v. Kurtzman* (1988) 46 Cal.3d 322, defendant argues that his counsel was ineffective because no objection was made to the prosecutor's closing argument that was "clear misconduct." The People counter that even if the prosecutor

misstated the law, defendant has failed to demonstrate IAC.

In *People v. Kurtzman*, *supra*, 46 Cal.3d 322, the court held the jury may not return a verdict on the lesser offense unless it has agreed beyond a reasonable doubt that the defendant is not guilty of the greater crime charged. However, the *Kurtzman* court concluded the jury should not be prohibited from considering or discussing the lesser offenses before returning a verdict on the greater offenses. (*Id*. at p. 329.)

During closing argument, the prosecutor argued: "The instruction, it's [CALCRIM No.] 3517, the long one that the judge read right at the end. It's super confusing when you hear. *You might have to read it a couple times to get it.* Let me give you a little bit of help, okay. Your verdict forms, you're going to have some for [c]ount 1, four of them, and four for [c]ount 2. It's going to be 1-A, 1-B, 1-C, 1-D. 1-A is going to be guilty for the greater crime, [c]ount 1. 1-B, not guilty. 1-C and 1-D have to do with the lesser offense, the simple assault. You don't get to consider the lesser unless you have decided already that the defendant is not guilty of assault with a deadly weapon. So you decide it's not a deadly weapon, couldn't have caused [great bodily injury] in this case despite how fragile the victim was, then you have to fill out not guilty for the greater crime and then you decide whether he's guilty of a lesser crime, okay. That's the order. You don't have to consider [c]ount 1 first or [c]ount 2 second. It doesn't have to go in that order because of the way it's charged. That's up to you. But you have to have this understanding that you don't move on to the lesser unless you've found the defendant not guilty of the greater crime." (Italics added.)

Additionally, in discussing the elder abuse charge, the prosecutor argued to the jury: "If you don't believe it happened under conditions that caused great bodily harm, don't feel like the victim could have been caused any serious harm from what the defendant did, then you have to find [him] not guilty and move on to the lesser . . . ." Later during deliberations, the jury sent the trial court a note that asked: "If we convict on the higher count, is the lesser count included?" Before the court could provide a response, the jury resolved its question and rendered guilty verdicts on the greater offenses.

To prevail on an IAC claim, the defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694; accord, *People v. Johnson* (2015) 60 Cal.4th 966, 979-980; see also *People v. Mbaabu* (2013) 213 Cal.App.4th 1139, 1148.) A "'"reasonable probability"'" is a probability sufficient to undermine confidence in the outcome of the proceeding. (*People v. Mbaabu*, *supra*, at p. 1149, citing *Strickland v. Washington*, *supra*, at p. 697.) The defendant bears the burden of demonstrating by a preponderance of the evidence that defense counsel's performance was deficient and it resulted in prejudice. (*People v. Centeno* (2014) 60 Cal.4th 659, 674.) If we can determine an IAC claim on the ground of lack of prejudice, we need not decide whether defense counsel's performance was

deficient. (*People v. Mbaabu*, *supra*, at p. 1149, citing *Strickland v. Washington*, *supra*, at p. 697.)

When the defendant alleges prosecutorial misconduct based on the prosecutor's closing argument, the defendant must show that in the context of the whole argument and the instructions given, there was a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. (*People v. Centeno*, *supra*, 60 Cal.4th at p. 667.) "If the challenged comments, viewed in context, 'would have been taken by a juror to state or imply nothing harmful, [then] they obviously cannot be deemed objectionable.' [Citation.]" (*People v. Cortez* (2016) 63 Cal.4th 101, 130.)

As a general rule, a defendant may not complain on appeal of prosecutorial misconduct unless a timely objection was made, and the defendant asked the court to admonish the jury to disregard the perceived impropriety. (*People v. Centeno*, *supra*, 60 Cal.4th at p. 674.) In limited circumstances, "[t]he defendant's failure to object will be excused if an objection would have been futile or if an admonition would not have cured the harm caused by the misconduct." (*Ibid*.) Because "[a] prosecutor's misstatements of law are generally curable by an admonition from the court," the issue is deemed forfeited unless a timely objection was made in the trial court. (*Ibid*.)

Defense counsel made no objection to the prosecutor's closing argument and no objection upon learning about the jury note. Therefore, we find the issue forfeited. (*People v. Centeno*, *supra*, 60 Cal.4th at p. 674.)

Nonetheless, to avoid the forfeiture rule, defendant asserts the prosecutor's argument was clear misconduct, and therefore, defense counsel was ineffective for failing to make an objection. We reject defendant's contention. As we will explain, defendant cannot establish prejudice resulted from the prosecution's statements about CALCRIM No. 3517. We therefore reject defendant's IAC claim.

As noted, under the *Kurtzman* rule, a trial court may not prohibit the jury from considering or discussing the lesser offenses before returning a verdict on the greater offenses. (*People v. Kurtzman*, *supra*, 46 Cal.3d at p. 329.) Here, the court correctly instructed the jury with CALCRIM No. 3517 that states, in part: "If all of you find that the defendant is not guilty of a greater charged crime, you may find (him) guilty of a lesser crime if you are convinced beyond a reasonable doubt that the defendant is guilty of that lesser crime. A defendant may not be convicted of both a greater and lesser crime for the same conduct." The court also advised the jury that the instruction was confusing and suggested the jury *read* the instruction again. The jury was given a written version of CALCRIM No. 3517 during its deliberation.

Defendant cannot demonstrate prejudice from the prosecutor's statements because the prosecutor also told the jury to *read* CALCRIM No. 3517 to understand the instruction. Defendant has not argued CALCRIM No. 3517 contains an inaccurate statement of the law because it states: "*It is up to you to decide the order in which you consider each crime and the relevant evidence*, but I can accept a verdict of guilty of a lesser crime only if you have found the defendant not guilty of the corresponding greater

crime." (Italics added.) Moreover, the jury was instructed that it must follow the court's instructions if it believed an attorney's comments on the law were in conflict with the court's instructions.

Defendant nonetheless argues "it is not conjecture to say that the jury did not consider the lesser included offenses." We disagree. The jury was separately instructed on the greater and lesser assault and elder abuse offenses. We cannot speculate based on the jury's question about whether the lesser offenses were included in the greater offenses, in what order the jury deliberated before arriving at their guilty verdicts on the greater offenses. "'[W]e presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade.' [Citation.]" (*People v. Osband* (1996) 13 Cal.4th 622, 717, citing *People v. Clair* (1992) 2 Cal.4th 629, 663, fn. 8.)

Because the jury was correctly instructed with CALCRIM No. 3517, and both the court and prosecutor told the jury to *read* the instruction, defendant cannot establish prejudicial prosecutorial misconduct. Therefore, defendant's claim of IAC must be rejected.

E. *Senate Bill No. 1393*

At the time defendant was sentenced, the trial court had no discretion to strike the five-year serious felony enhancement imposed under section 667, subdivision (a)(1). While defendant's case has been pending review, on January 1, 2019, Senate Bill No. 1393 became effective. (Stats. 2018, ch. 1013, §§ 1-2.) Senate Bill No. 1393 amends

sections 667, subdivision (a)(1) and 1385. Under the new law, for sentencing purposes, trial courts have discretion to strike or dismiss alleged section 667, subdivision (a) prior serious felony convictions, in the interests of justice.

Based on *In re Estrada* (1965) 63 Cal.2d 740, 746, defendant contends his case should be remanded for resentencing because Senate Bill No. 1393 applies retroactively. The People concede that a remand is required since the new laws could reduce defendant's punishment and the record shows a remand would not be futile. We conclude that a remand for resentencing in this case is appropriate.

In enacting Senate Bill No. 1393, the Legislature did not expressly declare that Senate Bill No. 1393, or the amendments it makes to sections 667, subdivision (a) and 1385, subdivision (b), apply retroactively to judgments not final on January 1, 2019, when the amendments to sections 667 and 1385 went into effect. However, the Legislature may enact laws that apply retroactively, either explicitly or by implication. (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 311.) Under the new laws, the trial court has discretion to either impose the same penalty as under the former law or impose a lesser penalty. (*People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 308.)

"When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which

it constitutionally could apply" (*In re Estrada*, *supra*, 63 Cal.2d at p. 745; *People v. Francis* (1969) 71 Cal.2d 66, 75-76; accord, *People v. Superior Court (Lara)*, *supra*, 4 Cal.5th at p. 307.)

In *People v. Francis*, *supra*, 71 Cal.2d 66, the Supreme Court found an inference that the Legislature intended retroactive application "because the Legislature ha[d] determined that the former penalty provisions may have been too severe in some cases and that the sentencing judge should be given wider latitude in tailoring the sentence to fit the particular circumstances." (*Id*. at p. 76.) Thus, absence of an express statement to the contrary by the Legislature, as applied in *Lara* and *Francis*, it is also appropriate to infer that the Legislature intended Senate Bill No. 1393 to retroactively apply to all nonfinal cases to which it could constitutionally be applied. We therefore conclude the Legislature intended retroactive application of Senate Bill No. 1393 to all judgments not yet final. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973.)

Section 1385, subdivision (b)(1) permits a court, if it has the authority, to strike or dismiss the punishment for that enhancement in the furtherance of justice. When a trial court exercises its authority in furtherance of justice, it does not wipe out the prior conviction or prevent it from being considered in connection with later convictions. Instead, it simply embodies the court's determination that, in the interest of justice, the defendant should not be required to undergo the statutorily increased penalty. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 508.)

A remand is appropriate where the record indicates that the trial court may exercise its discretion to strike or dismiss the enhancement under section 1385, if permitted to do so. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.) Defendant was sentenced to nine years in prison. The court sentenced defendant to the low term of two years, doubled to four years because of his prior strike for the aggravated assault.[2] The court recognized that it was required to impose a mandatory five-year prison term under section 667, subdivision (a)(1). Although the trial court was reluctant to strike the prior, that same prior conviction was used to impose the five-year enhancement. Here, the record also shows the trial court remarked that defendant was young, had family support, but needed to participate in a drug treatment program. Thus, the record does not demonstrate a remand would be futile.

We therefore remand this case to the trial court to consider whether to exercise its new discretionary authority to strike defendant's serious felony prior conviction for purposes of sentence enhancement.

[2] The court also imposed the low term of two years doubled with the strike for count 2, but stayed sentence pursuant to section 654.

IV.

DISPOSITION

The case is remanded for the limited purpose of allowing the trial court to consider whether to dismiss or strike the section 667, subdivision (a) serious felony enhancement. If the court so exercises its discretion, it shall resentence defendant accordingly. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

RAMIREZ
P. J.

FIELDS
J.